No. 487616

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MICHAEL MONTGOMERY,

Plaintiff/Respondent,

And

DENNIS MONTGOMERY and MIA MONTGOMERY,
husband and wife,

Defendants/Appellants,

APPELLANTS REPLY BRIEF

Appeal from Pierce County Superior
Court No. 13-2-13036-5

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I. OPPERATIVE FACTS AND ARGUMENT

Respondent essentially admits that the first time appellants/defendants became aware of the existence of a power of attorney provided by the respondent/plaintiff to his mother, Pamela Reed, was during the course of her examination in the first trial. Once that information became available, it was also apparent that appellants/defendants were compelled to raise the affirmative defense of consent, pursuant to CR 15(b). It is ironic that the respondent/plaintiff objected, and is objecting now, to the "surprise" defense of consent when the only persons having knowledge of the existence of that defense up until the time of Pamela Reed's disclosure of the existence of the power of attorney were Pamela Reed and respondent/plaintiff. The fact that the appellants/defendants stumbled upon these facts during the course of trial that had long been known to the respondent/plaintiff and his appointee can hardly be considered a legal ploy by the appellants/defendants given the respondent/plaintiff's longstanding knowledge of its existence.

Notwithstanding the above, respondent/plaintiff refers to the defense of consent as a "shocking new defense" not previously disclosed. How appellants/defendants were to disclose this "shock" prior to trial is yet to be explained by the

respondent/plaintiff. However, the factual underpinnings of a defense, when coupled with respondent/plaintiff's knowledge, make it clear that the deposition and interrogatory responses of appellants/defendants were consistent with such a defense, even without knowledge of the existence of the power of attorney. Both Dennis Montgomery and Mia Montgomery, in the sections of interrogatories and depositions previously cited, make it clear that all members of the family, including Pamela Reed, agreed to the disposal of respondent/plaintiff's property and there was even a specific direction given by Pamela Reed to Mia Montgomery (CP526-528) to sell the property. It is unfortunate that Mia was not allowed to testify in the first trial to that effect, but she did so by declaration before the beginning of the second trial in response to respondent/plaintiff's summary judgment motion, to no avail. Since there is little the Court of Appeals can do about the mistrial granted, it should address whether the trial court was justified in levying sanctions against the appellants/defendants.

The court's own words, as cited by the respondent/plaintiff at page 6 of his brief, provide some insight into the court's rationale for declaring a mistrial, but hardly supports the court's claim that it was appellants/defendants' fault. The court stated:

> Here's the deal, I do think that plaintiff has been prejudiced by the way this case has proceeded. If this information [existence of power of attorney]

> had been known from the beginning, they [plaintiff and presumably plaintiff's witnesses] could have prepared it and dealt with it a different way in terms of opening, in terms of presentation of the case.

To suggest that the respondent/plaintiff was unaware of his own power of attorney, and it was the fault of the appellants/defendants that the consent defense fell into the their lap during the course of the trial during Pamela Reed's testimony makes no sense.

Not only did the court blame the defense for not presenting a defense the facts for which were only known by the respondent/plaintiff until the middle of trial, the court also stated:

> It is not clear that conversation [phone call between Mia Montgomery and Pamela Reed] even took place much less that it took place in the timeframe that the defendant is telling me.

The court did not even bother to hear the testimony from Mia Montgomery before granting the mistrial. In other words, the court was arguably aware that such a defense may not have been supported by the facts of the case, but felt compelled to grant a mistrial anyway, instead of letting the parties testify on the issue.

Finally, although the respondent/plaintiff states that the appellants/defendants have inappropriately cited cases pertaining to discovery abuses or the failure to provide discovery, that is

basically the reason the court awarded sanctions against the appellants/defendants.

To cite respondent/plaintiff brief "in finding misconduct and awarding terms, the trial court stated:

> I do think there has been misconduct by the defense in terms of its lack of forthrightness during discovery."

However, the court fails to establish that the interrogatory and deposition answers of appellants/defendants were either untrue or misleading or were unresponsive.

The court was of the opinion during its colloquy which preceded granting the mistrial and sanctions, that the interrogatory and deposition answers of the appellants/defendants would otherwise be irrelevant to any defenses but for the existence of the power of attorney. The fact that the existence of the power of attorney was divulged and those facts then became very relevant, suggests the court should have allowed an amendment pursuant to CR 15(b) to include the defense of consent (as its existence was no surprise to the respondent/plaintiff), as opposed to granting a mistrial, much less sanctions against the appellants/defendants.

Respondent/plaintiff barely touches on the summary judgment motion that was granted by the trial court, if only because, regardless of who made a decision as to the manner of disposition of the property, the disposition was arguably agreed to

by the respondent/plaintiff via his attorney in fact. It is axiomatic that all facts and inferences that can be drawn from those facts is viewed in a light most favorable to the non-moving party pursuant to CR 56. Not only was that rule basically ignored, it was turned on its head.

II. CONCLUSION

The appellate court should find that the trial court abused its discretion by granting a mistrial and/or at the very least, by granting sanctions to the respondent/plaintiff based on the facts before it at the time of the first trial. Additionally, the trial court should not have deprived the appellants/defendants of all their affirmative defenses pursuant to the factually contested summary judgment motion.

The appellants/defendants were denied the right to present defenses available to them based on the facts before the trial court in not one, but two trials. They should be allowed to do so in the next one. Whether they would be successful or not with those defenses should be determined by the court, or trier of fact, at an appropriate time in the trial, but not before they have presented their case.

The court of appeals should reverse the trial court's rulings on sanctions and summary judgment and remand the matter for a trial on liability alone, and fix the respondent/plaintiff's damages in

accordance with the jury verdict after the second trial, subject to a liability determination.

DATED this 23rd day of December, 2016.

WEST LAW FIRM, P.S.

By: _____
Thomas J. West, WSBA #5857
Attorney for appellants

CERTIFICATE OF DELIVERY

On this day, I caused to be delivered by HAND DELIVERY a true and accurate copy of the foregoing Appellants Reply Brief to Casey Arbenz of The Hester Law Group. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of December, 2016, at Tacoma, Washington.

THOMAS J. WEST